No. 14-915

In The Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF SUSANA MARTINEZ, GOVERNOR OF NEW MEXICO, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Governor of New Mexico, Susana Martinez, who, pursuant to Article V, Section 4 of the New Mexico Constitution, has a sworn duty to faithfully execute the laws. This duty includes ensuring the rights secured by the New Mexico and United States Constitutions. Both the United States Constitution, pursuant to the First Amendment, and the New Mexico Constitution, through Article II, Section 17, protect the freedom of speech and the freedom of association.

The New Mexico Public Employee Bargaining Act ("NMPEBA"), 1978 N.M. Stat. Ann., Chapter 10, Article 7E, allows collective bargaining agreements covered by the NMPEBA to require state employees who are in union covered positions, and who do not wish to join the union ("non-union member"), to pay their "fair share" of union fees. 1978 N.M. Stat. Ann., §§ 10-7E-4(J), 10-7E-15(A), 10-7E-17(C). In 2009, prior to Governor Martinez's Administration, the State entered into collective bargaining agreements that require the deduction of "fair share" fees from the earnings of non-union members, with the fees then paid to unions. Official Agreement Between the State of New Mexico and American Federation of State,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than Governor Martinez and her counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed blanket consent letters with the Clerk.

County and Municipal Employees ("AFSCME"), New Mexico Council 18, Article 11; Agreement Between the State of New Mexico and The Communications Workers of America, AFL-CIO, CLC State Employee Alliance ("CWA"), Article 3; and, Agreement between the State of New Mexico and New Mexico Motor Transportation Employee Association ("NMMTEA"), Article 11. These "fair share" fees, also known as "agency shop" provisions, compel public employees to financially subsidize public sector unions, regardless of whether or not they are union members.

These "agency shop" provisions are particularly problematic in New Mexico. Currently, the State of New Mexico has 18,355 employees, and 56.9% of these employees are in union covered positions. AFSCME represents 7,622 employees, CWA represents 2,436 employees, and NMMTEA only represents approximately 40 employees. Of the approximately 10,000 union covered positions, about 1,600 employees pay "agency shop" fees through the state's payroll system. There may be additional employees that pay "agency shop" fees directly to the unions. In 2014, non-union members were forced to pay a total of approximately $650,000.00 in "agency shop" fees to AFSCME, CWA, and NMMTEA through payroll deductions. Additional amounts may have been paid directly to the unions. AFSCME's "agency shop" fees are only approximately $3.00 less than paying full membership dues. For full-time employees, AFSCME's forced "agency shop" fees range from $12.50 per pay period, to $14.89 per pay period, depending on the local chapter. This

totals approximately $325.00 to $387.14 in forced payments per year, for each employee that does not wish to join AFSCME.

Significantly, CWA forces employees who do not wish to join its union to pay the full amount of membership dues, which are the equivalent of two hours of their hourly rate of pay per pay period, and then requires those employees to "opt out" as members, and receive an unknown "rebate" amount. Accordingly, employees covered by CWA are forced to advance full membership dues amounts that are being used by CWA for both political speech and collective bargaining throughout the year. CWA's "agency shop" arrangement effectively requires employees who may not wish to join CWA to pay the full amount of joining the union all year, and also forces them to advance the cost of political speech with which they may not agree.

Additionally, unions in New Mexico have threatened state employees who have refused to pay "agency shop" fees with not only loss of their employment, but also with harm to their credit. For example, non-union employees have previously complained to the State that unions have turned them over to collection agencies for nonpayment of "agency shop" fees. One New Mexico union has even threatened to turn a non-union member over to a collection agency, unless the non-union member joined the union and paid membership dues, in which case, the past due "agency shop" fees would be waived. If the public employee receiving such threats cannot afford to pay the past

due "agency shop" fees, the union is effectively forcing the employee into union membership, in direct contradiction of the employee's United States and New Mexico Constitutional right to freedom of speech and freedom of association. *U.S.* CONST., amend. I; *and*, N.M. CONST. art. II, §17.

In addition to union threats, unions in New Mexico do not account for the percentage of "fair share" fees that go towards collective bargaining versus political or ideological activities. Therefore, public, non-union employees have no idea whether the fees paid go towards objectionable activities. Also, the burden on non-union public employees to challenge a union's use of agency fees is a heavy one that is difficult, if not impossible, to meet. *Harris v. Quinn*, 573 U.S. ___, 134 S.Ct. 2618, 2633 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. ___, 132 S.Ct. 2277, 2294 (2012).

Because this case implicates the constitutionality of New Mexico's "fair share" or "agency shop" provisions, Governor Martinez has a significant interest in the outcome, given her obligation to protect the constitutional rights of New Mexico's citizens.

Governor Martinez also has a deep rooted interest in New Mexico's public education system, and in protecting that system. Given empirical evidence that collective bargaining has a profoundly detrimental impact on poor and minority New Mexico students, *see* Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement:*

Evidence from a New Mexico Natural Experiment, 120 Yale L.J. 1130 (2011), the collective bargaining process is inexorably intertwined with public policy, especially in the context of New Mexico's public education system. Therefore, collective bargaining on the part of teachers' unions is at its core a political activity, and Governor Martinez has a vital interest in protecting the free speech rights of New Mexico's public employees who oppose the positions taken by the teachers' unions that have direct and significant public consequences.

SUMMARY OF ARGUMENT

In 2009, prior to Governor Martinez's administration, the State entered into collective bargaining agreements that require the deduction of "fair share" or "agency shop" fees from the earnings of non-union members to be paid to unions. Official Agreement Between the State of New Mexico and American Federation of State, County and Municipal Employees ("AFSCME"), New Mexico Council 18, Article 11; Agreement Between the State of New Mexico and The Communications Workers of America, AFL-CIO, CLC State Employee Alliance ("CWA"), Article 3; and, Agreement between the State of New Mexico and New Mexico Motor Transportation Employee Association ("NMMTEA"), Article 11. There are a multitude of reasons why a public employee would not want to be associated with and support a union. These reasons

might range from a practical or financial motivation, to an ideological belief.

For example, New Mexico's public employees have a constitutionally protected interest in public employment pursuant to the Fourteenth Amendment's Due Process Clause. *Lovato v. City of Albuquerque*, 106 N.M. 287, 289-90, 742 P.2d 499, 501-02 (1987) (recognizing classified city employee's constitutionally protected property interest in continued employment); *see also City of Albuquerque v. Chavez*, 125 N.M. 809, 965 P.2d 928 (1998); *Clark v. N.M. Children, Youth & Families Dep't*, 128 N.M. 18, 988 P.2d 888 (Ct. App. 1999).

New Mexico state law also provides numerous protections for public employees regarding their wages, benefits, and working conditions. *See, e.g.*, N.M. Stat. Ann., §§ 10-7-4, 10-7-4.1, 10-7-4.2, 10-7-8. These protections include safeguards regarding the terms and conditions of public employment, *see* N.M. Stat. Ann., § 10-9-1, *et seq.* (State Personnel Act), representation on State Boards and Commissions, *see, e.g.*, N.M. Stat. Ann., § 10-11-130 (representation of public sector employees on the State Retirement Board), protections for health care post-retirement, *see* N.M. Stat. Ann., §§ 10-7C-1, *et seq.* (Retiree Health Care Act), protections afforded to public benefits, *see* N.M. Stat. Ann., §§ 10-7B-1, *et seq.* (Group Benefits Act), including retirement benefits for public employees, *see* N.M. Stat. Ann., §§ 10-11-1, *et seq.* (Public Employees Retirement Act), whistleblower protections, *see* N.M. Stat. Ann., §§ 10-16C-1, *et seq.* (Whistleblower Protection

Act), and prohibitions against discrimination. *See* N.M. Stat. Ann., §§ 28-1-1, *et seq.* (Human Rights Act). These guaranteed benefits and protections for non-union members are the same as those provided to members.

In addition, non-union members recognize that their elected public officials are not driven to obtain profit and are held to high standards by their constituents. Elected public officials are not business owners seeking to maximize their financial returns, and these officials have a fiduciary duty to the public. If they fall below certain standards, they may be removed from or voted out of office. These same elected officials or public employers are required, for example, under the Governmental Conduct Act, 1978 N.M. Stat. Ann, § 10-16-3A, to "use the powers and resources of public office only to advance the public trust and not to obtain personal benefits or pursue private interests."

Based on the protections afforded under New Mexico law to public employees, as well as the legal standards binding public employers, a public employee might not feel any practical need to support union activities. This might be especially true, given that the New Mexico unions have not negotiated new contracts with the State since 2009. A public employee might also not feel a financial incentive to participate in union activities, especially given the protections already in place under New Mexico law with regard to wages and benefits, and with regard to public employer conduct.

Of particular import to this case, however, is that a public employee might choose not to support union activities because that employee disagrees with an ideology for which a union advocates. The right not to be compelled to exercise speech that a person opposes is a fundamental freedom guaranteed by the First Amendment. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . .").

Public sector collective bargaining, by its very nature, influences governmental policy, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977), and, therefore, is political in nature. Therefore, whether a public employer accedes to a union's demands ultimately involves a political process. *Id.* at 228; *Quinn*, 134 S.Ct. at 2632. Although *Abood* distinguishes between collective bargaining and ideological union activities, 431 U.S. at 236, the differences are impossible to apply practically. Bargaining about even such core issues as wages and pensions have important public policy implications in the context of the allocation of limited financial resources. Fulfilling union contract obligations impacts what the state can do with limited funds and how it prioritizes the uses of those funds. For example, the more money the state allocates for wages and pensions, the less funds will be available for other priorities.

Evidence that public sector collective bargaining influences governmental policy is especially apparent in the context of New Mexico's public education system. Various provisions regarding teacher benefits typically emerge from the collective bargaining process, such as terms governing the length of the school day, the school calendar, and class sizes. Lindy, *supra* at 1138. All these core terms influence and restrict how school districts allocate their budgets. *Id.* For example, the smaller the class size mandated by union contract, the more teachers that a school district needs to hire. *Id.* This impacts how a school district can use its funds, and, therefore, how it prioritizes educational initiatives. *Id.*

The policy relevance of the collective bargaining process involving teachers' unions in New Mexico becomes readily apparent when examining teacher transfer rights. Empirical evidence suggests that collective bargaining over teacher transfer terms shifted the focus of New Mexico public schools away from low performing students towards higher performing ones, resulting in increased SAT scores for higher achieving students but lower graduation rates for lower performing, less affluent, minority students. *Id.* at 1169.

Accordingly, regardless of whether a teachers' union uses this empirical evidence to argue it improves the quality of education, or whether those who oppose teachers' unions point to lower graduation rates to support their position that teachers' unions have an adverse impact on student achievement, the bargained for teacher transfer rights impacts educational

policy in either case. *Id.* at 1179. This impact necessitates school districts to weigh the trade-offs at stake when forming educational policy. *Id.* at 1176. Teachers should not be compelled to subsidize a unions' bargaining positions that impact educational policy, which is akin to political speech rather than mere bargaining or contract administration.

Because collective bargaining in the public sector is, at its core, a political activity with direct and significant implications for the general public, non-union member public employees should not be compelled to support a union's activities through "fair share" fees or "agency shop" arrangements.

ARGUMENT

I. There Is No Practical Manner to Distinguish between Bargaining and Ideological Union Activities

In *Abood*, the Court distinguished between collective bargaining activities, for which fees or dues may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. 431 U.S. at 236; *Quinn*, 134 S.Ct. at 2632. The Court was clear that it was not defining a dividing line between collective bargaining and ideological activities. *Abood*, 431 U.S. at 236. It recognized, however, the difficulty in drawing such a line, especially given such factors as the budgetary and appropriations decisions concordant with establishing a union

contract prescribing the terms and conditions of public employment. *Id.*

These very budgetary and appropriations decisions, however, make it impossible to make a practical distinction between collective bargaining and ideological activities in the public sector. In the public sector, core bargaining issues like wages, pensions, and benefits are important political issues. *Quinn*, 134 S.Ct. at 2632. This is because bargaining about even such core issues as wages and pensions have important public policy implications in the context of the allocation of limited financial resources. Fulfilling union contract obligations impacts what the state can do with limited funds and how it prioritizes the uses of those funds. For example, the more money the state allocates for wages and benefits, the less funds will be available for other priorities. As state and local governmental expenditures on employee wages and benefits have mushroomed, *see id.*, leaving less funds for other priorities, the budgetary impact of union contracts has become even more of a political issue.

The evidence that public sector collective bargaining influences governmental policy is especially apparent in the context of New Mexico's public education system. Due to changes in New Mexico's collective bargaining laws, the compilation of empirical evidence regarding how collective bargaining impacted student achievement was possible. Between 1993 and 1999, New Mexico required school districts to collectively bargain with teachers' unions. Lindy,

supra at 1135. Specifically, the mandatory collective bargaining law, in effect from April 1, 1993 to July 1, 1999, included a sunset provision, 1978 N.M. Stat. Ann., § 10-7E-26, so that the law would automatically expire unless a subsequent legislature reauthorized it. Lindy, *supra* at 1135. In 1999, the enabling legislation expired and the New Mexico legislature did not reauthorize the law until 2003. *Id.* Therefore, between 1999 and 2003, school districts in New Mexico could refuse to bargain with teachers' unions.

Benjamin Lindy, a Yale College and Yale Law School graduate, conducted an empirical study to identify the causal impact of the mandatory collective bargaining laws on New Mexico public education students using an estimation strategy about the effects of collective bargaining based on the lapse in the mandatory collective bargaining laws in New Mexico. *Id.* at 1150. His study found that while the mandatory collective bargaining laws led to an increase in performance for high achieving students, it led to a decrease in high school graduation rates for poorly achieving students, with no effect on per-pupil expenditures. *Id.* at 1150, 1169.

Lindy noted various union contract provisions regarding the terms and conditions of teacher employment that influenced and restricted how school districts allocated their budgets. *Id.* at 1138. Of particular import to Lindy's study was the union contracts that included transfer rights for teachers, which resulted in experienced teachers becoming concentrated in a school district's higher income, higher

performing schools, and newer teachers with less experience being assigned to higher poverty schools, with lower performing students. *Id.* at 1139, 1173.

Absent collective bargaining, the more experienced teachers lost their transfer rights. *Id.* at 1173. Therefore, New Mexico school districts could shift experienced teachers away from concentrated areas of high performance to areas of high need. *Id.* Accordingly, schools saw an increase in achievement of lower performing students in schools where there was a high level of poverty and minority students. *Id.* When collective bargaining became mandatory again in New Mexico, the opposite occurred, and the achievement of lower performing students dropped, resulting in an increased drop-out rate. *Id.* at 1150, 1169.

Although teachers may not necessarily become more effective the longer they teach, they do provide schools with stability and serve as mentors to new teachers. Often, the most successful schools have a healthy combination of experienced teachers and new teachers.

The policy relevance of the collective bargaining process involving teachers' unions in New Mexico, therefore, becomes readily apparent when examining teacher transfer rights – a core bargaining issue that on its surface appears to be simply a term or condition of employment subject to the bargaining process, but upon closer examination implicates educational policy. Because collective bargaining over teacher transfer terms shifted the focus of New Mexico public

schools away from low performing students towards higher performing ones, resulting in increased SAT scores for higher achieving students, but lower graduation rates for lower performing, less affluent, minority students, *id.* at 1169, a school district's negotiation of teacher transfer terms impact educational policy, requiring the school district to weigh the trade-offs at stake. *Id.* at 1176.

Lindy's study provides a practical example within the confines of New Mexico's public education system of the reason why *Abood's* distinction between political or ideological and collective bargaining activities is unworkable. Teacher transfer rights are the subject of core collective bargaining activities because they impact the terms and conditions of teachers' employment. However, because teacher transfer rights also directly impact student achievement, contract provisions governing those rights also have ideological ramifications.

Also, there is no manner in which to separate out fees for political union activities versus collective bargaining activities, when the two are inexorably intertwined. School district policies necessarily emerge from the collective bargaining process that impact how teachers are assigned to schools, which in turn shapes the quality of the students' educational opportunities and achievement. Therefore, "fair share" fees or "agency shop" arrangements, even if they are purportedly used for just bargaining activities, compel non-union members to fund a union's position on the emergent educational policies.

Accordingly, *Abood's* distinction between bargaining and ideological union activities is unworkable, because such a distinction cannot actually be defined. When bargaining about core terms and conditions of employment such as teacher transfer rights is so intertwined with public policy considerations, the impossibility of distinguishing between bargaining and ideological union activities becomes apparent.

II. The First Amendment Protects Non-Union Members from Being Compelled to Support Union Activities That Are Ideological in Nature

Non-union members should not be compelled to subsidize through "fair share" fees or "agency shop" arrangements a union's activities that are ideological in nature. *Abood*, 431 U.S. at 236. In the context of New Mexico's public education system, teachers should not be compelled to subsidize a unions' bargaining positions that impact educational policy, which is akin to ideological or political speech, rather than to a mere bargaining activity about employment benefits or contract administration.

Academic freedom has long been viewed as a special concern of the First Amendment. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978). There are four essential freedoms that constitute academic freedom: (1) to determine who may teach, (2) what should be taught, (3) how it should be taught, and (4) who should be admitted to study.

Although *Bakke* involved safeguarding those freedoms within university communities, *id.*, the overarching principle that academic freedom "'is of transcendent value to all of us, and not merely to the teachers concerned,'" *id.* (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (internal citation omitted)), informs this case.

A school district's decision regarding where to assign experienced versus newer teachers given the impact on the academic achievement of public school students is an important academic freedom and allows the district to determine the best way to teach all students given the balancing that must be undertaken in light of empirical evidence that students who have access to a pool of highly qualified, experienced teachers perform better academically. When collective bargaining was no longer mandated for New Mexico's public education system, and the pattern of teachers moving from low to high income schools ended, there was a significant impact on student achievement.

The First Amendment prohibits coercing citizens to fund speech they oppose. *Barnette*, 319 U.S. at 642; *United Foods*, 533 U.S. at 411. As evidenced by Lindy's empirical research, public sector collective bargaining, by its very nature, influences policy with regard to New Mexico public education. Outside the public education context, the budgetary decisions implicated when negotiating a union contract involving the terms and conditions of public employment, *see Abood*, 431 U.S. at 236, has political ramifications. *Quinn*, 134 S.Ct. at 2632. Public employment

should no sooner be conditioned on subsidizing speech regarding public policy than it can be conditioned on paying for political advocacy.

The First Amendment implicates both what a person has a right to say and what a person has a right not to say. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Therefore, just as the First Amendment would prohibit firing a public school teacher for criticizing a school district's efforts to raise revenues, *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968), the First Amendment would likewise prohibit firing a teacher for speaking out against transfer rules based on seniority. If a teacher is protected by the First Amendment for speaking out on these issues, it is axiomatic that the First Amendment would likewise prohibit the firing of teachers for not speaking out on the issues. In other words, a teacher cannot be compelled to speak about these issues. New Mexico's "fair share" fees or "agency shop" arrangements, however, do just that – coerce public employees to pay money to support positions that become ideological or political because of their impact on public policy.

Collective bargaining in the public sector is, at its core, a political activity with direct and significant implications for the public at large. It impacts not just the fiscal health of the State of New Mexico, but also the State's ability to provide public services, in addition to the constitutional rights of non-union member public employees who are being compelled to

support labor unions through "fair share" fees or "agency shop" arrangements. The First Amendment prohibits the coercion of political or ideological speech. Therefore, New Mexico's "fair share" fees or "agency shop" arrangements violate non-union members' First Amendment rights.

CONCLUSION

This Court should overrule *Abood v. Detroit Bd. of Educ.* and invalidate public sector agency shop arrangements because they violate the First Amendment, and have a profound adverse effect in properly educating public school students in the State of New Mexico.

Respectfully submitted,

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